SUPREME COURT

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 73-527

In the Supreme Court of the United States

OCTOBER TERM, 1973

LUCIO CASTRO,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROY R. BARRERA
NICHOLAS AND BARRERA
424 E. Nueva By La Villita
San Antonio, Texas 78205
Telephone: 512, 224-5811

Attorney for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-527

LUCIO CASTRO,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, LUCIO CASTRO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the Petitioner's conviction of conspiracy to possess with intent to distribute and to distribute heroin hydrochloride, in violation of 21 U.S.C. §841(a)(1).

OPINIONS BELOW

There was no formal opinion of the District Court. The *per curiam* opinion of the Court of Appeals (Appendix, hereinafter cited "App.," *infra*, p. 17)

has not been reported. The judgment of the Court of Appeals is reproduced below (App., *infra*, p. 18). The order of the Court of Appeals denying Petitioner's petition for rehearing is reproduced below (App., *infra*, p. 19).

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1973 (App., *infra*, p. 17). The order of the Court of Appeals denying Petitioner's Petition for Rehearing was entered on July 23, 1973 (App., *infra*, p. 19). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Rule 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether after additional discovery the refusal to allow the Petitioner to recall witness THOMAS SALINAS for further cross-examination violated the Sixth Amendment.
2. Whether the failure to grant the Petitioner's motion for a mistrial after the guilty plea of his co-defendant violated the Fifth and Sixth Amendments.
3. Whether the trial court lacked venue and jurisdiction in violation of the Sixth Amendment.
4. Whether the evidence was sufficient to support the finding of guilt as to the conspiracy in count one of the indictment, 21 U.S.C. §§ 841(a)(1) and 846.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, clause 3 to the Constitution of the United States provides, in pertinent part:

> The Trial of all Crimes, except in Cases of

> Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . .

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT

On December 6, 1972, the Petitioner, LUCIO CASTRO, was charged in count one of a seven count indictment with conspiracy to possess with intent to distribute and to distribute heroin hydrochloride, a Schedule I narcotic drug controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Appendix on Appeal, hereinafter cited "R.," pp. 1-6). The conspiracy alleged in count one of the indictment allegedly commenced from on or about November 1, 1971, and continued up to and including June 1, 1972, and further included as defendants, ANTONIO V. ENRIQUEZ, THOMAS D. SALINAS, FELIX GARCIA BENEVIDES, a/k/a FELIX G. BENAVIDZ, JOE

YNOSTROSA, and ARLENE SALINAS. The overt acts alleged in count one of the indictment in furtherance of the conspiracy failed to mention or to name the Petitioner, LUCIO CASTRO. The Petitioner plead not guilty and proceeded to trial before a jury in the Abilene Division of the Northern District of Texas, Abilene, Texas. The case was transferred from the Fort Worth Division, where the indictment was returned, to the Abilene Division on the motion of the court. On the first day of trial, defendants THOMAS D. SALINAS and FELIX GARCIA BENEVIDES entered pleas of guilty, the Court granted a severance on the part of JOE YNOSTROSA and ARLENE SALINAS, and the evidence in the trial commenced with the two remaining defendants, ANTONIO V. ENRIQUEZ and the Petitioner, LUCIO CASTRO. The Petitioner rested his case at the conclusion of the case of the government and did not offer any witnesses in his behalf and did not testify in his behalf. On January 18, 1972, tht Petitioner was found guilty of count one of the indictment, the Court having overruled the Petitioner's motions for a new trial and arrest of judgment, and the Petitioner was sentenced to a fifteen year term of confinement, with a special parole term of three years in addition to the fifteen year term of imprisonment.

The Petitioner appealed the judgment of the trial court to the United States Court of Appeals for the Fifth Circuit and the Court of Appeals affirmed the judgment of the trial court on June 26, 1973 (Appendix, hereinafter cited "App.," *infra*, p. 17). The Court of Appeals denied the Petitioner's petition for rehearing on July 23, 1973 (App., *infra*, p. 19).

Briefly stated, the facts that gave rise to the questions presented by the Petitioner in his appeal and in

this petition for writ of certiorari are as follows:

In the Court of Appeals below, the Petitioner attacked the failure of the trial court to grant his motion for a mistrial after his codefendant, ANTONIO V. ENRIQUEZ, had plead guilty on the second day of the trial. The failure to grant the Petitioner's motion for mistrial occurred after the Petitioner had previously requested the trial court to grant him relief from prejudicial joinder because of the affect of the misjoinder of both the alleged offenses and the defendants. The failure to grant a mistrial also occurred after evidence had been introduced before the jury in support of some of the other counts of the indictment in which the Petitioner was not named. The Petitioner also contended in the Court of Appeals below that his Sixth Amendment rights were seriously abridged by the denial of the trial court to recall the government witness, THOMAS D. SALINAS, for futher cross-examination prior to the government resting their case. The Petitioner had previously had the opportunity and did cross-examine the witness fully as to certain matters he testified about, but as a result of the delayed discovery by the government of letters in their file (R. 917-923) written by the witness, THOMAS D. SALINAS, the Petitioner desired to further confront and cross-examine the government witness for the purpose of attacking and impeaching his credibility. Such further confrontation and cross-examination of the government's witness was critically necessary in view of the fact that the only two witnesses of the many government witnesses at the trial that testified as to any incriminating facts concerning the Petitioner were the witnesses, THOMAS D. SALINAS, and his wife, ARLENE SALINAS (R. 362-408, 429-552, 552-

610). At the trial on the merits the testimony of the two government witnesses (THOMAS D. SALINAS, an indicted co-conspirator, and ARLENE SALINAS, an unindicted co-conspirator) was admitted into evidence and was in conflict on two critical points, the first being whether or not ARLENE SALINAS was ever present at or about the time the alleged conspiracy took place, and the second being the approximate date that the Petitioner was allegedly observed handling narcotic drugs. The Petitioner contended in his appeal that the denial of further confrontation and cross-examination prior to the government resting their case placed the Petitioner in the untenable position of going forward with evidence after his motion for judgment of acquittal had been overruled, and, thereby, put him in jeopardy of the application of the waiver doctrine.

The Petitioner also sought to challenge in his appeal to the United States Court of Appeals for the Fifth Circuit the failure of the trial court to grant his motion for change of venue and motion for dismissal of the indictment based upon the lack of venue and lack of jurisdiction of the court of either the Petitioner or the alleged offense. Although the case was tried in the Northern District of Texas and although a discernable part of the testimony concerned conduct and actions of other defendants within the Northern District of Texas, the only evidence tending to connect the Petitioner, a resident of San Antonio, Texas, with the offense alleged in count one of the indictment occurred in San Antonio, Texas, which is located in the Western District of Texas. Also in the Court of Appeals below the Petitioner objected to the sufficiency of the evidence to support the finding of guilt as to the conspiracy alleged in count one of the indictment, in violation

of 21 U.S.C. §§ 841 (a)(1) and 846. The Petitioner contended that at best, and in taking the evidence of the government witnesses in the light most favorable to the government, that the evidence nevertheless failed to establish the requisite knowledge on the part of the Petitioner of the criminal activity involving the possession or possession with intent to distribute heroin hydrochloride, and failed to establish that the Petitioner entered into an agreement, either actually, constructively, tacitly, or by implication, to commit an illegal act against the United States.

REASONS FOR GRANTING THE WRIT

1. The Petitioner contended in the trial court and in the Court of Appeals below that the refusal to allow the Petitioner after additional discovery the opportunity to recall the government witness, THOMAS D. SALINAS (indicted co-conspirator), for further cross-examination seriously abridged the Petitoner's Sixth Amendment right of confrontation and cross-examination. Of the fourteen witnesses called by the government the two most material witnesses, with respect to any implication of the Petitioner in the alleged conspiracy to support count one of the indictment, were government witnesses THOMAS D. SALINAS, an indicted co-conspirator (R. 205-368, 362-408, 429-552), and his wife, ARLENE SALINAS, an unindicted co-conspirator (R. 552-610). The Petitioner had requested prior to the trial on the merits a bill of particulars (critical to the Petitioner in light of the fact that the Petitioner was not named in any of the overt acts alleged in the indictment covering the period of the conspiracy, from November 1, 1971, until June 1, 1972), which was denied. The Petitioner also requested in his pretrial motion for discovery the

statements of any of the co-defendants or co-conspirators, whether indicted or unindicted, and regardless of when made or to whom made. The motions having been denied the cause proceeded to trial and on the first day the witness, THOMAS D. SALINAS, took the stand for the government, and the government complied with the Petitioner's Jencks Act requests and furnished to the Petitioner what was purportedly the case file and all of the statements of the witness, THOMAS D. SALINAS. With the statements of THOMAS D. SALINAS available to the Petitioner for cross-examination, the witness, THOMAS D. SALINAS, concluded his testimony and was excused from the stand (R. 552). After having been excused from the stand the Petitioner was furnished three (3) additional letters in the handwriting of the government witness, THOMAS D. SALINAS, and written by him (1) to the Honorable Sarah T. Hughes, United States District Judge, and (2) to the Honorable Leo Brewster, United States District Judge, and (3) to the United States Attorney (R. 917-923). The trial court denied the Petitioner the right to further confrontation and cross-examination of the witness at the time of the discovery of the additional three letters (R. 676), and denied his request to recall the witness again prior to the government resting their case (R. 788).

The further confrontation and cross-examination of the witness, THOMAS D. SALINAS, in light of the content of the letters to Judge Hughes, to Judge Brewster, and to the United States Attorney, was critical to the Petitioner in order to afford him the opportunity to impeach the government witness. In his letter to Judge Hughes SALINAS admitted his past use of drugs, admitted his past use of heroin as a palliative for

bad nightmares, and made statements about how he was doing all within his power to assist the government and government agents (R. 917-918). In the letter to the United States Attorney, dated December, 1972, the witness SALINAS made statements to the effect that the government had made him promises and that the government had not lived up to their promises. The witness SALINAS in that letter threatened the Untied States Attorney to refuse to testify for the government and threatened to allow the Petitioner to go free unless the government helped the witness, THOMAS D. SALINAS (R. 922-923). The content of the letters of the witness was contradictory in part to the statements he made on the witness stand, and the Petitioner should have had the opportunity to confront and cross-examine the witness about his statements in order to apprise the jury as to the nature, environment, and credibility, or lack of credibility, of the witness.

The failure to allow the Petitioner to recall the witness for further confrontation and cross-examination seriously abridged the Petitioner's Sixth Amenment right to confrontation and cross-examination. *Smith v. Illinois,* 390 U. S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). In *Smith v. Illinois, supra,* this court held that a defendant is deprived of his right to confront the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments, when he is denied the right to ask the principal prosecution witness either his correct name or where he lives. This Court, per Mr. Justice Stewart, stated that "the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court exam-

ination and out-of-court investigation. To forbid the most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." See also *Barber v. Page,* 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). *Pointer v. Texas,* 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). *Douglas v. Alabama,* 38 U. S. 414, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). *Bruton v. United States,* 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). *Dutton v. Evans,* 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). *Berger v. California,* 393 U. S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1968). *Alford v. United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931).

The decision of the Court of Appeals below opens the door in future trials, as in this case, for the government to withhold, either by design or accident, material or documents within their possession which will materially assist any defendant in any criminal case in the effective cross-examination of government witnesses. It only becomes necessary for the government to turn over to the defendant, after the witness in question has fully testified and has left the witness stand, any documents that may be tend to discredit the witness and thereby comply with the Jencks Act, and thus, to compel the defendant to then place on the witness stand the chief witness of the government in order to illicit the contradictory statements of the government witness. In *Smith v. Illinois, supra,* this court stated that the underlying rationale for the confrontation and cross-examination of witnesses is to expose falsehood and bring out the truth and the denial of such confrontation and cross-examination would be constitutional error of the first magnitude. The Petitioner respectfully submits herein that any limitation

by the trial court on full and complete confrontation and cross-examination which tends to deprive a defendant of exposing falsehood and bringing out the truth is a serious constitutional error and a denial of a defendant's constitutional right to full and complete confrontation and cross-examination. See *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

2. The Petitioner in the trial court in the Court of Appeals below contended that the trial court was without jurisdiction because it lacked venue, and alternatively, that the trial court lacked jurisdiction because of the failure to establish sufficient evidence to justify venue in the Northern District of Texas. Consequently, the Petitioner was denied a fair and impartial trial. The Framers to the Constitution drafted Article III, Section 2, clause 3, aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him. The importance of that safeguard was underscored by the Sixth Amendment to the Constitution, which was plainly intended to protect persons accused of crimes of the serious hardship of defending prosecutions in places removed and remote from their homes. The Petitioner herein was indicted in the Fort Worth Division of the Northern District of Texas, and the case was subsequently transferred to the Abilene Division of the Northern District of Texas. His home and the only area where his participation, if any, occurred was in San Antonio, Texas, in the Western District of Texas. A review of the entire record and evidence compells the conclusion that all of the witnesses were in agreement that the Petitioner was never in Fort Worth, Texas, and that he had not participated in any of the multiple narcotic sales the other

defendants admittedly were involved in, and that he had never stated by his own admissions any complicity in the conspiracy between THOMAS D. SALINAS and ANTONIO V. ENRIQUEZ. The venue in the instant case was maintained by the mere allegation in the indictment, unsupported by the evidence. This Court condemned that type of situation in *United States v. Johnson,* 323 U. S. 273, 65 S. Ct. 249 (1944). The Court stated in *Johnson* that "plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense, but it also leads to the appearance of abuses, if not abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." This Honorable Court should grant a writ in this case in order to decide whether or not the trial court lacked venue and jurisdiction in violation of the Petitioner's Sixth Amendment right to trial by an impartial jury "of the state and district wherein the crime shall have been committed."

3. The Petitioner also contended in the Court of Appeals below that he was substantially deprived of a fair and impartial trial when the trial court failed to grant his motion for mistrial after the entry of the guilty plea by his co-defendant, ANTONIO ENRIQUEZ. The Petitioner had requested by written motion prior to trial for relief from prejudicial joinder both as to the offenses alleged in the indictment and as to his co-defendants. See Rule 8 (a), (b), Federal Rules of Criminal Procedure. The indictment was a seven count indictment naming six defendants, but the Petitioner was oly named in one count of the indictment, the conspiracy count. The conspiracy count failed to allege or name any overt acts against the

Petitioner. The probability of irreparable harm and prejudice is almost always certain where the jury has the opportunity to impute to one defendant the acts and statements of another defendant named in other counts of the indictment. Such is almost always the inevitable result when several defendants are charged with a single offense or related offenses. In the instant case substantial evidence had been accumulated and presented before the jury as to the involvement of the Petitioner's co-defendant, THOMAS D. SALINAS, with narcotics over a period of time commencing in November, 1971, until June, 1972. The sudden absence of co-defendant, ENRIQUEZ, from the trial, and his obvious plea of guilty, served to impress upon the jury his confession of guilt, which was tantamount to a confession or statement against the Petitioner. Under such circumstances prejudice was created against the Petitioner, and he timely moved for a mistrial (R. 421-423), the denial of which deprived him of a fair and impartial trial. Such a denial cannot be considered harmless error, and this Court should grant a writ in this case in order to resolve the issue.

4. Although the Petitioner conceded that the evidence sufficiently reflected the participation of the other defendants in an alleged conspiracy, he respectfully submits that the evidence nevertheless failed to sufficiently connect him with the conspiracy alleged in count one of the indictment. The jury verdict finding the Petitioner guilty demonstrates the inherent harm and prejudice that occurs as a result of the hearsay declarations of the other defendants in the absence of any independent and corroboratig actions on the part of a co-defendant. This Honorable Court should grant a writ in the case at bar in order to establish a

uniform test to be applied in the circuit courts of appeals in circumstantial evidence cases to prove conspiracy. See *Ingram v. United States*, 360 U. S. 672, 79 S. Ct. 1314, 3 L. Ed. 2d 1503 (1959). *Direct Sales Company v. United States*, 319 U. S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674 (1942). In *Ingram, supra,* this Court stated the fundamental rule that for a conviction for conspiracy to be sustained there must be proof of an agreement to commit an offense against the United States. Moreover, the Court stated in *Direct Sales Company v. United States, supra,* that conspiracy law should not be utilized as a "dragnet." In the case at bar the government witness, THOMAS D. SALINAS, testified that he observed the Petitioner engaged in the illegal acts about the middle of May, 1972, approximately two weeks before this arrest. The witness further stated that he had never seen the Petitioner on prior trips, and that the Petitioner never told him that he was a partner in the narcotics trade, and that the Petitioner never appeared in the Fort Worth area (R. 395, 399, 481-482). The government witness also stated in cross-examination that his wife, ARLENE SALINAS, was never in the ENRIQUEZ home at the time he witnessed the events in question, and that his wife, ARLENE SALINAS, was not a witness and knew nothing about the cutting of narcotics on the occasion that the Petitioner was allegedly present (R. 489-490). ARLENE SALINAS testified, in direct conflict with her husband, THOMAS D. SALINAS, that the events in question occurred in the month of March, 1972, and she further positively stated that another man, previously identified by her husband as "Veto," was not present (R. 569-574, 593). Thus, on two material matters, the time of the alleged conspiracy and the

parties who participated in the alleged conspiracy, the two critical government witnesses were in direct contradiction to each other. Such a conflict of testimony allows the jury to speculate and conjecture on what the true facts are. It is apparent in the case at bar that the evidence is insufficient to prove a conspiracy, and that a conspiracy cannot be made out by merely piling inferences upon inferences. See *Ingram v. United States, supra. Direct Sales Company v. United States, supra.*

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals in the instant case raises substantial questions of general importance in the administration of criminal justice, and it is, therefore, respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

NICHOLAS AND BARRERA
424 E. Nueva By La Villita
San Antonio, Texas 78205
Telephone: 512, 224-5811

Attorneys for Petitioner

By:_____
ROY R. BARRERA

September, 1973.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Solicitor General, Mr. Robert Bork, United States Department of Justice, 12th Street, Washington, D. C. 20530, by placing same in the United States Mail on this_____ day of September, 1973.

ROY R. BARRERA
Attorney for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1542
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LUCIO CASTRO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(June 26, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 73-1542
Summary Calendar

D. C. Docket No. CR 4-1159

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUCIO CASTRO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 26, 1973

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S73-1542

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LUCIO CASTRO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(July 23, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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Supreme Court, U. S.
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No. 73-527

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OCTOBER TERM, 1973

LUCIO CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-527

LUCIO CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the jurisdiction and venue of the trial court over the crime charged. He also claims that a co-defendant's guilty plea should have resulted in the termination of petitioner's trial as requested, that he was denied his right to cross-examination, and that the evidence was insufficient to sustain his conviction.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy to possess with intent to distribute and to distribute heroin hydrochloride, in violation of 21 U.S.C. 841(a)(l) and 846. He was sentenced to a term of fifteen years' imprisonment and an additional special parole term of three years.[1]

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[1]The one count involving petitioner was the first of a seven-count indictment also involving Antonio V. Enriquez, Thomas D. Salinas, Felix Garcia Benevides, Jose Ynostrosa and Arlene Salinas, all

The court of appeals summarily affirmed (Pet. App. 18), and a petition for rehearing was denied on July 23, 1973 (Pet. App. 19). The time for filing a petition for certiorari was extended by order of Mr. Justice Powell until September 21, 1973, but the petition was not filed until September 22, 1973, and is thus untimely.

In May 1972, co-defendant Thomas Salinas, who had known petitioner for about eight years, met with petitioner in San Antonio, Texas, to arrange to purchase heroin (A. 364, 395-396).[2] Salinas testified that while he was at the home of co-defendant Antonio Enriquez, petitioner arrived with one Veto (A. 438, 485-486). Petitioner brought a spare tire from the trunk of his car into the den of Enriquez's home (A. 397-398, 487). Enriquez cut the tire open with a big hunting knife and removed a paper sack containing about two and a half pounds of heroin and a similar quantity of cocaine (A. 396-397, 439-440).

The heroin and cocaine were in plastic bags, wrapped in newspaper (A. 439-440). Petitioner and Enriquez took the heroin and cocaine into the kitchen to use the blender (A. 441, 446-447). Enriquez instructed Salinas "to go up to the front window to watch to see that nobody came to the house" (A. 441). Petitioner was heard by Salinas to "state that the cocaine was not as good as the other they had before" (A. 442). Petitioner then asked Salinas if he would like to try some and gave Salinas

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of whom were named as co-conspirators in count one and all of whom but Arlene Salinas were named as defendants in that count. Each was also charged with one or more substantive counts alleging distribution of heroin hydrochloride, in violation of 21 U.S.C. 841(a)(1). Due to severances and pleas, the case went to the jury only as to petitioner.

[2]"A." designates the appendix in the court of appeals, which includes a copy of the transcript of the trial. A copy of the appendix is being lodged with the Clerk of this Court.

some cocaine to test (A. 399, 442). Petitioner and Enriquez then packaged some of the heroin and gave it to Salinas first so that he could go to Fort Worth (A. 401-402, 451). Salinas received six ounces of heroin, brought it to Fort Worth, and sold it to a federal agent (A. 402, 451).

About two weeks later, Salinas called Enriquez from Fort Worth to arrange another sale, and Enriquez went from San Antonio to Fort Worth, where, on June 1, 1972, he met with Salinas and delivered some heroin (A. 389-395).

During one of Salinas' trips to San Antonio, when he was short of money, petitioner asked him if he wanted to do something to make more money (A. 442). Petitioner told Salinas that "he had some people in Laredo that needed to be taken care of" (A. 442). Enriquez told Salinas that he and petitioner were partners and "had a good connection" (A. 481-482).

Arlene Salinas accompanied her husband to San Antonio on a number of occasions (A. 453, 591). In March 1972 she accompanied him to the Enriquez home and there saw Thomas Salinas, Enriquez and petitioner in the dining room, where they were opening plastic bags, putting the contents into a blender, and measuring out the heroin in a spoon (A. 568-574, 608).

Petitioner did not testify and presented no witnesses.

1. Petitioner's contention that the evidence was insufficient to support his conviction is without merit. Testimony of an accomplice is a sufficient basis for a conviction if not incredible on its face. See *United States* v. *Strauss*, 443 F. 2d 986, 991 (C.A. 1), certiorari denied, 404 U.S. 851.

2. Petitioner contends that the trial court lacked the requisite jurisdiction and venue (Pet. 11-12). But it is well established that prosecutions in conspiracy cases may be maintained either in the district in which the conspiracy was entered into or in any district in which an act was done to effectuate the object of the conspiracy. See 18 U.S.C. 3237(a); *Hyde* v. *Shine*, 199 U.S. 62, 76-77; *Gayon* v. *McCarthy*, 252 U.S. 171, 177. The indictment charged, *inter alia*, that as part of the conspiracy one or more of the defendants would travel from Fort Worth to San Antonio to acquire heroin from one or more of the other defendants and thereafter cause it to be transported to Fort Worth for distribution to persons there. Among the overt acts specified were Salinas' call to Enriquez and their meeting in Fort Worth on June 1, 1972. There is sufficient evidence of the participation of petitioner's co-defendants in acts in furtherance of the conspiracy in the Northern District of Texas.[3]

3. Petitioner contends that it was reversible error for the trial judge to fail to grant petitioner's motion for mistrial subsequent to the guilty plea entered by co-defendant Antonio Enriquyz (Pet. 12-13). At the beginning of the second day of trial, out of the presence of the jury (A. 406-407), Enriquez changed his plea to guilty (A. 406-419). Petitioner then moved for a mistrial, but the motion was denied and the trial resumed (A. 421-424). There is nothing in the record to indicate that the jury ever knew that Enriquez's withdrawal from the

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[3]Transfer of petitioner's case from the Fort Worth Division to the Abilene Division, both being within the Northern District of Texas, has no significance for venue or jurisdictional purposes. *Bostick* v. *United States*, 400 F. 2d 449, 452 (C.A. 5), certiorari denied, 393 U.S. 1068.

trial was the result of the entry of a guilty plea. Moreover, in his charge, the judge instructed the jury as follows (A. 850-851):

> The only question before you in this case is the issue of the guilt or innocence of the defendant, Lucio Castro. What has happened to any of the other defendants or what may happen to them is not material to the issues in this case except insofar as it may bear on the credibility of a codefendant who is testifying as a witness. You should decide the question of the guilt or innocence of Mr. Castro on the basis of the facts—the evidence that you have heard here in this case without regard to the guilt or innocence of any other defendant. In other words, each defendant's guilt has to be proved by evidence beyond a reasonable doubt without regard to whether any or all of the other defendants are guilty.

In these circumstances, no error was committed when the trial judge refused to grant petitioner's motion for a mistrial.

4. Petitioner's contention that he was improperly denied the right fully to cross-examine witness Thomas Salinas (Pet. 7-11) is insubstantial. After the government's direct examination of Thomas Salinas, he was extensively cross-examined by petitioner (A. 467-551). At the close of the government's case, petitioner's counsel asked if he could recall Salinas. The trial judge thereupon stated that "[y]ou can recall him and continue cross-examination of him" (A. 789). Petitioner's counsel then presented motions out of the presence of the jury (A. 790-799) and rested his case without calling any witnesses (A. 796, 800). The judge, with the express consent of petitioner's counsel, then excused all the witnesses (A. 800).

It was during the government's closing argument that petitioner's counsel first claimed that petitioner had been denied the right to cross-examine Salinas further. The following colloquy then took place between petitioner's counsel (Mr. Leon) and the court (A. 839-840):

MR. LEON: * * * I asked to have Mr. Salinas for further cross examination, asked permission to further cross examine Salinas prior to the time the government rested and I was denied that by the Court. * * *

THE COURT: Well, I told you then that you could recall him for further cross examination.

MR. LEON: But you told me I had to recall him on my case and they could go ahead and rest. I wanted to recall him for further cross examination on their case, because he was their witness.

THE COURT: I do not see where it makes any difference.

These facts of record fully answer the claim of denial of cross-examination.[4]

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[4]Petitioner's contention that he was denied the right to cross-examine Salinas subsequent to the furnishing of certain Jencks Act material to him by the government (Pet. 8) is unsupported by the record. At the time the three letters mentioned in the petition (Pet. 8) were furnished to petitioner, he was assured by the court that he could cross-examine Salinas further (A. 677-678). Petitioner, however, never took advantage of that opportunity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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